Pardoning, Zemiology and Harm[1]

Introduction

This article investigates pardoning and harm in England and Wales in the twentieth and twenty-first centuries, laying the foundations for zemiological accounts of pardoning. Here, a broadly defined zemiological notion of social harm is combined with thinking about cultural harm from both within and outside zemiology and, in so doing, zemiological thinking is further developed. Cultural harm is considered alongside other forms of social harm because, in the context of pardoning at least, it is not productive to separate hurts, even were this entirely possible.

In this perspective, amongst other things, pardoning is identified as recognising and addressing harm, as well as failing and being reluctant to address harm and also as playing a role in creating and sustaining a climate in which harm happens and is allowed to continue. Along the way, the article provides a brief, partial sketch of the relationship between pardoning and appeals - because appeals are impossible to exclude from discussions of pardoning in this period. In doing so, existing zemiological work on appeals is also drawn upon and developed.

The article begins by looking at harm. Next it briefly reflects on methods, moving on to introduce pardoning, before focusing on pardoning and harm. Here the argument begins by suggesting that pardoning can address and to some degree rectify harm (although there are suggestions along the way that pardoning should not be seen as an entirely straightforwardly benevolent device), then moves on to look at pardoning and the ways in which pardons are deployed more critically, focusing on harm. I conclude by suggesting possible avenues for future research.

Harm

Before addressing pardoning, it is important to set out the zemiological perspective adopted here. Following the title of the 2004 collection edited by Paddy Hillyard, Christina Pantazis, Steve Tombs and Dave Gordon, which marked the beginnings of the zemiological turn in social sciences, zemiology is taken to be a field of study which lies *Beyond Criminology* and is concerned with the study of avoidable social harms.[2] As such,

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[2] It is now well enough established as a discipline to have, for example, its first professor (special issue co-editor, Christina Pantazis), an entry in the Oxford Handbook of Criminology (Hillyard and Tombs, 2017) as well as a Wikipedia page (https://en.wikipedia.org/wiki/Zemiology). Now

zemiology poses alternatives to criminology and challenges the discipline for its limited (and limiting) focus on crime (which is recognised to be a human construction). More broadly, zemiology is taken to be a field which has a radical agenda and politics.

The study of avoidable social harm allows the thinker to look both inside and outside the fuzzy and shifting boundaries of what is (in theory or in practice) criminal. It allows for the study of a wide range of harms, including those that have attracted the attention of criminal law, those which have not and those harms which are produced by criminal law and the criminal justice system of which it forms a part. To date zemiological studies of harm have, for example, looked at gender, the state, murder, migration and the workplace.

Following Hillyard and Tombs in 2004, harm is not precisely defined in this article, as insisting on a precise meaning risks limiting the concept - and missing harm. Broadly speaking though, I take as my starting point the everyday meaning of harm - as damage, injury, hurt, destruction. According to Hillyard and Tombs, social harm would include emotional, psychological, physical and financial harms as well as, significantly for present purposes, harm to 'cultural safety', which they suggested might involve restriction of access to cultural resources (Hillyard and Tombs, 2004: 20).

My work has focused upon zemiology before. Building on gender and sexualities scholarship[3] in 2004 'Heterosexuality as Harm: Fitting in' (*Beyond Criminology*, chapter 4) developed '[t]he idea that constructions of heterosexuality can inflict harm' (Bibbings, 2004: 217) by examining the contexts of medicine and education. In doing so, the chapter explored the harms caused by the idea of 'real sex' and of the 'natural' (Bibbings, 2004: 219-20). It highlighted the effects of heterosexuality's binary thinking, its dimorphic and hierarchical ontology; which separates men and women, labels bodies either male or female, seeing them as passive or active and which gives priority to men. For instance, the privileging of the heterosexual family was identified as causing harm to individuals and families who in various respects failed to fit this mould (Bibbings, 2004: 227-8). This study of social harm was concerned with harm fostered by a cluster of ideas associated with heterosexuality which had a particular cultural currency. Or to put it another way, it was argued that ideas circulating in a particular cultural context created and sustained an environment where harm was more likely to be caused to people who variously did not 'fit in'. So, a form of cultural harm was explored in this paper and this thinking is taken forward here.

Whilst an embryonic notion of cultural harm as a form of social harm was taken to be within the purview of zemiology in *Beyond Criminology*, the concept is thought to have emerged within campaigns and studies concerned with harms perpetrated upon Aboriginal peoples (Garner and Elvines, 2014: 2).[4] In 2002 an incredibly powerful and personal paper by Lorena Sekwan Fontaine described the 'legacy of cultural harm' in relation to the Indian Residential School system in Canada, for example.[5] Up until the late

conference papers and articles discuss zemiology and books have consciously sought to mark out the field - Pemberton, 2016; Boukli and Kotzé, 2018.

[3] Including work by Rich, 1980; Jeffries, 1990; Wittig, 1992.

[4] I am grateful to Dr Tanya Palmer for sharing her detective work and thoughts on this work and its link to feminist scholarship.

[5] On the history of the Schools see especially Molloy, 1999.

twentieth century children were removed from their families, homes and communities and placed in 'a foreign and abusive environment created to eliminate their culture' (Fontaine, 2002) – or, in the words of a government official in the early 1900s, in order to rid Canada of its 'Indian problem' by assimilation (quoted by Fontaine, 2002). This was an attempt to bring about 'cultural extinguishment' (Fontaine, 2002). Moreover, for some the School system was part of a calculated policy of cultural and physical genocide (Chrisjohn and Young with Maraun, 1997).

For Fontaine, the 'cultural racism' of the School era resulted not only in immediate cultural harm but also left a 'legacy of cultural harm' (Fontaine, 2002). Fontaine explained this in terms of her own family. Her grandfather, parents, aunts, uncles and mother had all been taken away from their communities, their homes, separated from relations, ill-treated and abused within the Schools. Now her generation were affected, despite the fact they grew up after the last School had closed (Fontaine, 2002). Research highlights this 'Third Generation - Intergenerational Cultural Harm' (Fontane, 2002), which includes loss of language, identity and culture, alcohol and drug abuse, violence and high suicide rates (see further: MacDonald and Steenbeek, 2015; Bombay *et al,* 2014; Elias *et al*, 2012). Moreover, some studies point to '*genocidal outcomes*, in terms of intergenerational trauma and cultural disintegration' (MacDonald and Hudson, 2012: 428).

So here cultural harm relates to damage done to the culture of a People and it has a legacy. It impacts upon individuals, families and communities, in the past, in the present and, without significant reparative action, will continue to do so.[6] The use of cultural harm in this context is very specific and applying the notion elsewhere requires care. In this article I draw upon the idea of harm having a legacy. In addition, this work helped inform the way in which I look at cultural harm here.

In England and Wales feminist scholarship and campaigning on pornography has deployed the idea of cultural harm. In 2009 feminist lawyers Clare McGlynn and Erica Rackley criticised Government approaches to pornography and argued for the criminalisation of extreme pornography and, in particular, 'rape pornography' (pornographic images of rape). In doing so, they tried to move beyond direct cause and effects thinking (that pornography causes sexual violence towards women), arguing instead that 'extreme pornography may contribute to a cultural context in which violent sexual activity is encouraged or legitimated, what we would call a form of "cultural harm".' (McGlynn and Rackley, 2009: 256-257) So it might be said that harm is done to the cultural context by pornography, creating an environment where the harm of sexual violence is more likely and is less likely to be recognised as harm or to be taken seriously, including by the criminal justice system – and, in this view, pornography may cause indirect harm (see especially McGlynn and Rackley, 2009: 257-8).[7]

Subsequently Tanya Palmer revisited McGlynn and Rackley's work in order to develop and generalise their concept of cultural harm and then to explore whether cultural harm arguments worked in relation to rape pornography and its criminalisation (Palmer, 2018). It is the former part of her writing which concerns us here. In seeking to

[6] See further, for example: James, 2012; Canadian Government 'Delivering on Truth and Reconciliation Commission Calls to Action' webpages.

[7] See also, in particular, McGlynn and Rackley, 2014, 2018. They also raised this idea a little earlier in 2007 (681-2).

more precisely define cultural harm, her starting point was that it is 'a type of harm which manifests in the normalisation of attitudes and practices deemed negative', with 'normalisation' defined as 'a process by which attitudes, practices and/or ways of being become accepted as routine, unremarkable or at least understandable aspects of everyday life' (Palmer, 2018: 39). In this model 'human action is shaped by, but not entirely determined by, the actor's cultural milieu' (Palmer, 2018: 40). Palmer deploys Nicola Gavey's idea of the 'cultural scaffolding of rape' (Gavey, 2005) to expand upon this thinking. Here common place ideas about 'normative sexual relations', such as men's supposed need for sex versus women's use of sex instrumentally to sustain relationships, were conceived of as having the effect of both 'mak[ing] rape easier to perpetrate and harder to address' (Palmer, 2018: 40). Or, as Gavey phrased it, 'persistently gendered patterns of heterosexuality' form the cultural scaffolding of rape, with the 'naturalization of women's passivity and men's aggressive pursuit of sex' letting 'rape slip by unnoticed as just part and parcel of normal sex' (Gavey, 2005: 214). Gavey's focuses in on harmful ideas in a similar way to my heterosexuality as harm argument, suggesting that one might look at ideas which can provide support for harm.[8]

Palmer shaped and drew together these accounts in order to argue that cultural harm in general terms 'refers to the development of cultural resources which underpin harmful interactions with others' (Palmer, 2018: 1). By way of a helpful illustration she considered the 2016 European Union referendum, where Leave texts 'served to normalise racist and anti-immigration attitudes through the messages conveyed', focusing upon white working-class Britons as victims and immigrants as the threat. She explained that '[c]umulatively, these texts contribute to the cultural scaffolding which supports the manifestation of racism and xenophobia in material harms such as discrimination and hate crime' (Palmer, 2018: 41).

Writing from within zemiology, Alex Dymock's work (2018) also considered McGlynn and Rackley's arguments. She highlighted, amongst other things, the fact that their use of cultural harm was (successfully) deployed in order to criminalise individuals rather than to focus upon structural harms – and in doing so played into the 'war on crime' (Dymock, 2018:179). In contrast, zemiological perspectives tend, amongst other things, to 'identify the harms of continual reliance on criminalisation as a solution to social problems' (Dymock, 2018: 168). With this in mind, the need to adopt a careful approach to the uses to which zemiological accounts might be put – and of the possible implications and effects of calling something harmful – underlies the consideration of pardoning here. Also, Dymock's reminder about structural harm is crucial to the analysis below.

This article draws together and utilises these ideas about different forms of social harm, including cultural harm, in order to consider pardoning and harm.[9] It does so

[8] So existing work on rape narratives or myths might usefully be further explored in this context. See, for example: Smith and Skinner, 2017; Gurnham, 2018.

[9] There is other important work on cultural harm which does not figure here but warrants a mention. In particular, Lois Presser's work asks why we harm, arguing, for example, that we harm as a consequence of 'cultural logics, typically in the form of stories, that reduce the target of harm and conjure ourselves as both authorized to harm and powerless not to.' (Presser, 2013: 109). Whilst connections might be developed between Presser's work and this study of pardoning - and

without adopting a rigid and limiting definition of harm and without being too concerned to separate out that which might be considered cultural from other forms of harm – harm matters however we might opt to categorise it. In addition, separating out harms is not always possible; financial and emotional harm can occur as the result of the same event or culturally prevalent idea, for example. Moreover, as this is an investigation of pardoning and harm, the analysis looks not only at the harm that can be associated with pardoning but also at whether pardoning addresses and rectifies harm.

Research Methods

This article forms a small part of a project on the Shot at Dawn Campaign which eventually led to the pardoning of men executed for military offences by the British military during World War One (see section 359 Armed Forces Act 2006). It is informed by the work so far undertaken for this project, including interviews with some of the campaigners, but draws mostly upon initial investigations into the use and nature of pardoning. So, pardoning in relation to military cases is considered alongside pardoning in the context of the civilian criminal justice system.

Pardoning is jurisdictionally specific. Consequently, although scholarship relating to other legal systems was considered within the research process, this article only considers pardoning in the UK. More specifically, the focus is on England and Wales. Scotland is not specifically considered because of its distinct criminal justice system. Ireland (which was part of the UK at the beginning of the period under consideration) and Northern Ireland are not completely excluded but are only briefly alluded to here because exploring the political context and the use of pardoning on the island was far too large a task for the present paper – this is something to which I will return in the conclusion below.

In terms of the time period, starting in the early twentieth century meant the focus was on a key moment when criminal appeals came into being and this meant that some tentative explorations of the relationship between the two devices (pardons and appeals) could be attempted. Also, as is discussed below, the use of pardoning changed once there was a criminal appeal court, so the 1900s were a key turning point in the history of pardoning.

Pardoning in the form of remissions of sentence (which authorise the early release of a prisoner) was, for the most part, not considered in order to narrow the focus, neither were pardons granted as a reward for helping the authorities or on medical or compassionate grounds. Pre-conviction pardons were also excluded.[10] I did not attempt to investigate all relevant pardoning cases in the period, focusing instead on a few key and high-profile instances of pardoning which figured prominently in the relevant literatures. This means that the current article is exploratory and provisional, inviting further investigation.

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thinking about stories about and around pardoning could be particularly productive - the present project has more points of contact with the scholarship already noted.

[10] On pre-conviction pardons see *Boyes* (1861). Other possible types of pardoning are sometimes referred to but these too are excluded from consideration here. See, for example, Rubin, 2007: ftn 18.

I reviewed literature on the recent history of pardoning in England and Wales as well as studying cases of pardoning and associated materials, including work on zemiology, on harm and on appeals. To a degree the analysis adopted legal and socio-legal methods in terms of reading cases and statutes. More generally, as opposed to methods of analysis in social science research and in keeping with my work as a historian, I have used what I have previously referred to as a literary-historical approach, involving reading, thinking and identifying key ideas – and more reading, thinking and identifying, as well as writing (Bibbings, 2004: 5-6). In reading cases, commentaries and other materials I was alert to harms and to selecting material which might help develop a zemiological analysis of pardoning. In terms of a research question, I adopted the extremely broad: 'how does harm relate to pardoning?'

Pardoning

Pardoning can be royal or statutory. A royal pardon (the royal prerogative of mercy) can take different forms. The types focused on here are 'free' (unconditional) and 'conditional' pardons. They are granted by the monarch on the advice of ministers – or, more precisely, a principle Secretary of State (Ministry of Justice, 2009, paras 54-5). A free royal pardon is said to remove the consequences of the conviction in question, but it does not undo it – the idea being that only a court can quash a conviction. So, the pardonee remains convicted but is no longer meant to feel the negative effects of their conviction (in terms of legal disqualifications, for example - see *Foster* [1985] 130). Conventionally, free pardoning is not supposed to be about forgiveness because it was said that a free royal pardon could only be granted to the technically and morally innocent (the subject of a pardon had to have 'clean hands'),[11] meaning that there was nothing to forgive. However, its use was not always depicted in this way[12] and, indeed, has not always been confined to such cases. Moreover, as we shall see, free pardoning seems no longer necessarily to be tied to this kind of thinking at all. In contrast, at present a successful appeal against conviction to the Court of Appeal does not require innocence,[13] instead the court enquires into the 'safety' of the conviction.[14] Conditional royal pardons solely relate to sentence, whereby a lesser punishment is substituted on the condition that the convicted person serve it (in the past a death sentence might be replaced by imprisonment, for example). Here both the conviction and its effects stand. By way of comparison, a successful sentencing appeal will vary the sentence.

A statutory pardon is simply a pardon granted by an Act of Parliament. This means that it could take a very wide variety of forms. For example, the statutory pardon of the men shot at dawn did not remove either their convictions or their sentences and the

[11] For examples of mention of the 'clean hands doctrine' in the context of free pardoning recommendations see, for example, Rubin, 2007: 49, 50, 54, 55-6.
[12] For example, see an 1847 memorandum quoted in *Bentley* [1994] 357 which mentions 'a doubt of guilt'.
[13] On innocence and appeals, see especially: Roberts, 2003; Quirk, 2007.
[14] See Criminal Appeal Act 1968, s 2, as amended by Criminal Appeal Act 1995, s 2(1) (a). This applies to appeals to the Criminal Division of the Court of Appeal from the Crown Court. There is an automatic right of appeal in relation to convictions in the magistrates' courts but here the appeal takes the form of a retrial (Magistrates' Courts Act 1980, s 108).

possibility of a royal pardon of some sort being granted at some future date was left open. Statutory pardoning can also be difficult to identify – for instance, in the context of Northern Ireland there is room for argument as to whether Good Friday Agreement remissions of sentences provided for by the Northern Ireland (Sentences) Act 1998 constitute a form of pardoning (compare Mulvihill, 2001 with McEvoy *et al*, 2015, for example). To complicate things further in terms of the different forms of pardon, as the shot at dawn example demonstrates, now a pardon (royal or statutory) can be granted posthumously.

The legal context in which pardoning takes place has altered somewhat over the period studied here and some of these changes have had a direct impact upon pardoning. In the very early years of the twentieth century there was no possibility of an appeal following a criminal conviction as there was no criminal court of appeal until the 1907 Criminal Appeal Act set up the then Court of Criminal Appeal, following worries occasioned by two pardoning cases (one of which was that of Adolf Beck – see further below).[15] Ninety or so years later the role of the prerogative of mercy was greatly reduced as a consequence of the Criminal Appeal Act 1995. This measure resulted from concerns over miscarriage cases, including that of the Birmingham Six (*McIlkenny*; *Hill*; *Power*; *Walker*; *Hunter*; *Callaghan* [1992]). It created a new body, the Criminal Cases Review Commission (CCRC), with powers to refer convictions in criminal courts to the Criminal Division of the Court of Appeal when normal rights of appeal had been exhausted.

The CCRC was established in April 1997. In addition to its role in relation to appeals, where a royal pardon was being considered it could be asked to assist the Secretary of State (1995 Act section 16).[16] Part of the thinking in relation to the provisions regarding appeals and pardons was to limit executive incursions into judicial matters; enquiring into possible injustices, abuses and mistakes was a matter for an independent body and undoing sentences or convictions handed down by the courts was a matter for the judiciary. Consequently, the use of royal pardons, was likely to be reduced by the Act (see *Halsbury's* 20 (2014) 3, (4) 139).

In contrast, the use of statutory pardons has had something of a resurgence in the twenty-first century, with the pardoning of groups of men. Thousands have been pardoned as a consequence of just two Acts of Parliament; the men who were shot at dawn and men convicted in relation to consensual sexual activities under homosexual offences which no longer exist (see below).

So royal and statutory pardons are very different. Yet some similar things can be said about them.[17] Moreover, as the above begins to suggest, the relationship between pardoning and appeals is, at least, an interesting one. Appeals under the ordinary system and via the CCRC exist at the very end of the criminal justice system. The CCRC role, as an independent body lies outside the criminal justice system, although it is somewhat constrained by the need to predict how the Court of Appeal might view the case in

[15] Prior to this a trial judge could refer a question of law to the Court for Crown Cases Reserved but only where there had been a conviction. See Bibbings, 2014: 15-16.
[16] See further Quirk, 2009: 651.
[17] In order to do so, however, some broad generalisations and simplifications are deployed here - and much is left out, meaning that there is further work to be done on pardoning and harm beyond the present article.

deciding which cases to refer.[18] Pardoning, whether royal or statutory, comes at or towards the end of a criminal matter but is handed down by very different means and has different effects to an appeal. In addition, pardoning, especially by the sovereign, is, it might be said, more splendid, more glamourous, less ordinary, as compared with the decision of a court, perhaps even if it is the Court of Appeal hearing a case referred by the CCRC. And these devices (pardons and appeals) along with the Commission, exist in a complex relationship of interconnection and separation.

Pardoning and Harm

How then does harm relate to pardoning? As already suggested, the types of circumstance in which a pardon can be granted are by no means clearly bounded and pardoning can take various forms. However, at the most basic level, where granted, a pardon of the kinds under consideration here could be said to represent a recognition of and a response to harms of conviction and/or sentencing. These are harms in which the criminal justice system is at least involved or implicated if not the cause. Moreover, pardoning (to an extent) rectifies harm and can demonstrate a malleability in seeking to do so, meaning that it can be deployed when an appeal is not available and can be used in ways that go against what has previously been understood to be possible and permissible. Pardoning then does good. It mends, it remedies. It provides justice. In this analysis, far from being in some way conceived of as being concerned with cultural harm, pardoning might be said to be a positive societal or cultural force (and similar things might be said about appeals, although the latter are perhaps less grand, less shiny). It is crucial to acknowledge this; pardoning is hugely important to the pardoned, their families and descendants. Pardons are desperately sought after for good reason.

Some pardoning cases relate to the innocent, the probably innocent and people convicted as a result of wrong-doing or errors within the criminal justice system**.** In other instances, such as the men convicted of criminal offences because they engaged in consensual gay sex, the harm comes from the attitudes of the time; or to put it another way, from the harmful effects of a cultural context which prioritised heterosexuality and tended to mistreat those perceived as failing to 'fit in' (or the scaffolding idea might be deployed here).

The harms suffered by the pardoned relate to conviction and sentence as well as associated harms suffered as a consequence of conviction and sentencing. They map on to the social, physical, financial and psychological harms discussed by Michael Naughton in the context of 'miscarriages of justice', by which he means both ordinary appeals (which follow the normal process) and appeals referred back to court outside the normal appeal process (cases such as the Birmingham Six) (see especially Naughton, 2004).[19] This list might be expanded, to include emotional harm. The harms could include loss of reputation, loss of freedom, removal from family and friends, loss of livelihood or career, depression and, in capital cases of the past, loss of life at the hands of the state. All these things, however, harm not only the person concerned but also their family, their friends and the harm is not limited to the timescape in which a conviction and sentence take

[18] See, for example, Quirk, 2007: 764.
[19] Naughton's output regarding miscarriages of justice is prolific. See Naughton website.

place, rather it bleeds down the generations, meaning that, as Fontaine explained, harm leaves a legacy. Janet Booth, granddaughter of Private Harry Farr, who in 1916 was shot at dawn for the military offence of 'misbehaving before the enemy in such a manner as to show cowardice' despite having been diagnosed with shell shock (Putkowski and Sykes, 1989: 121; Booth and White, 2017), powerfully conveys the harm felt in the past (by her mother and grandmother) and present (by herself and other family members, knowing of Harry and his wife and child's suffering). She also describes getting the news of his pardoning – her mother was 'absolutely over the moon' (see, for instance, Snow interview). As we shall see, a legacy of harm is felt by other pardoning and appeal case families.

Sometimes pardons address harm where no other solution exists; they save the day – and pardons, of course, come from outside the criminal (and military) justice system, giving them a distinct and special role in relation to what might be described as the harms of the criminal (and military) justice system. Let us consider two instances where free royal pardons were granted in order to illustrate this idea of pardoning being the only possible remedy.

Adolf Beck had been twice convicted of property offences involving deception, first in 1896, then in 1904. Subsequently it became clear that the real perpetrator was a man with more than a passing resemblance to Beck. However, he could not appeal as there was no criminal court of appeal at this time. There was a public campaign which attracted some popular support. As a result, two free royal pardons were granted in 1904 and Beck received financial compensation (see Sweeney 2006; Sims, 1904). So, in Beck's case, pardoning was filling in a gap in the criminal justice system by addressing the harm where there was no other means of doing so.

Michael Shields[20] was convicted of attempted murder. The assault upon which this was based happened in Varna in 2005 and Shields was convicted by a Bulgarian court – so the initial harm of conviction and sentence took place within a different criminal justice system, setting the case somewhat apart from the others considered here. New evidence subsequently emerged which meant his guilt was called into question (another man confessed). Attempts at appealing his conviction in Bulgaria were unsuccessful. Shields was then repatriated so that he might serve his sentence in the UK and there was nothing else to be done in terms of legal system remedies. The then Secretary of State for Justice, Jack Straw, was called upon to recommend a free pardon but refused on the basis of legal advice (it was said that the Repatriation of Prisoners Act 1984 and the Convention on the Transfer of Sentenced Persons 1983 prevented a pardon in Shields's circumstances). The matter was then referred to the Administrative Court which ruled that the Secretary of State did have the power to recommend a pardon (*Shields* [2008]). As a consequence of this decision, Jack Straw recommended that Shields be granted a free royal pardon as he met the 'very high test of moral and technical innocence' (Naughton, 2009 and see Straw, 2009). It was duly granted and he was released from prison (Gabbatt, 2009). So, in relation to both Shields and Beck, pardoning saved the day by offering some sort of harm remedy where there was nothing that could be done within the criminal justice system.[21]

[20] The factual detail here is drawn from *Shields* [2008].

[21] In pardoning Shields it has also been argued that the territorial reach of pardoning was extended, which by both common law and international law was thought by some to be geographically bounded. See Bennion, 2009.

A pardon can, of course, never entirely undo harm. In addition, there are specific ways in which different forms of pardoning only partially rectify harm. For instance, a conditional pardon only addresses sentence. Where it is awarded following a pardon, financial compensation can provide assistance but it cannot undo the past and it is not always forthcoming.[22] In the case of a free pardon, the conviction stands. This means that, for some, obtaining a free pardon is not enough as a key part of the harm remains; if a person is innocent, then the least that is needed is a quashing of the conviction. For example, the campaign around the Alice Wheeldon case, currently led by her great-granddaughter Chlöe Mason, wants an appeal against Wheeldon's conviction for conspiracy to murder Prime Minister Lloyd George in 1917. A pardon is irrelevant as the charge against the state is that Wheeldon and her family were framed by a government agent (Alice Wheeldon campaign). In capital cases where the person or people convicted have been executed this need to quash the conviction can, unsurprisingly, be particularly acute – and here again we see the legacy of harm.

In 1952 19-year-old Derek Bentley was convicted with 16-year-old Christopher Craig of the murder of Police Constable Sidney George Miles. The murder charge arose from events that played out on a warehouse roof. The young men were being chased by police, Craig had a gun, Bentley was armed with a knuckleduster. At one-point Bentley, who was described as 'illiterate' and 'below average intelligence' (*Bentley* [2001] 347), shouted 'Let him have it, Chris' (*Bentley* [2001] 308). Bentley was arrested and then Craig shot Miles. Bentley's guilt was founded on the fact that he was part of a joint criminal enterprise (namely warehouse-breaking), meaning he could potentially be held liable for offences which occurred during the enterprise (*Bentley* [2001] 308). Craig could not be sentenced to death because of his age, so was imprisoned. Bentley received a death sentence and then appealed unsuccessfully against conviction. His only chance at this stage was for the question of a conditional pardon to be considered so that his life could be saved. The jury had recommended mercy, although the judge had not. The Home Office advice to the Home Secretary of the time was that a conditional pardon should be recommended. He, however, declined to do so. Bentley was, therefore, hanged in early 1953 (for the history of the case see *Bentley* [1994] 354-6).

Bentley's sister's long campaign for a posthumous pardon led in 1992 to Home Secretary Kenneth Clarke considering recommending a royal pardon but rejecting her plea. It is clear from his statements around this that he was addressing the possibility of a free pardon and his rejection was based upon the notion that such a pardon required moral and technical innocence (see *Bentley* [1994] 355-6). Iris Pamala Bentley, however, sought to challenge Clarke's decision by bringing a judicial review (*Bentley* [1994]). Here the High Court decided that it had jurisdiction to look into a royal pardoning recommendation decision. The court considered not only the Home Secretary's decision not to recommend a free pardon because of a question mark over innocence but also looked at his failure to consider a conditional pardon. In fact, the latter was the focus of the case, along with the issue of whether a posthumous conditional pardon could be granted. The court found that a posthumous conditional pardon should have been considered and that here the grant of a pardon would be a recognition of a mistake, namely that a reprieve should have been granted in 1953 so that the execution never

[22] Shields was released without monetary support. See Brown, 2010.

happened (*Bentley* [1994]: 365). This was, however, seen as an exceptional case (*Bentley* [1994]: 366), meaning no floodgates would be opened should the Home Secretary decide to recommend such a pardon.

As a result of this case, Clarke did indeed recommend a conditional royal pardon, which was granted in the summer of 2003. But there the matter did not rest. The family continued campaigning as the pardon was not enough – the original harm and its legacy remained. They now focused on the conviction, with an appeal rather than a pardon in mind. The case was sent to the newly created CCRC which decided to refer it to the Court of Appeal under section 9(2) of the Criminal Appeal Act 1995 – the procedure for appeals to be heard outside the normal appeal process. In 1998, over 40 years after he had been hanged, the Court quashed Bentley's conviction (*Bentley* [2001]). In such unusual cases, where there is a long gap between the original trial and the appeal, the appellate judges undertake a potentially complex task. Here the court had to apply: the substantive law of murder as it was at the time of Bentley's conviction; the contemporary common law on joint unlawful enterprise; and the conduct of the trial, direction to the jury and safety of the conviction were also to be judged according to modern standards (*Bentley* [2001]: 310). In Bentley's case, however, this did not cause the kinds of problems in terms of intellectual gymnastics and time-travelling which might be imagined occurring, as the focus was on the conduct of the trial by the judge, with the Court of Appeal making a number of findings including that 'the summing-up as a whole had been such as to deny the appellant a fair trial which was the birthright of every British citizen' (see *Bentley* [2001] 308 and generally).[23] Hence the conviction could not stand - and the Court of Appeal felt that this should have been picked up by the then Court of Criminal Appeal in 1953. (see *Bentley* [2001] 340; Rubin, 2007: 43)

So, Derek Bentley was at last found to be not guilty of murder and the family were awarded financial compensation. His parents had died in the 1970s, his sister the year before the successful appeal, meaning her daughter, Maria Bentley-Dingwall, steered the final stages of the campaign. Here again we see how harm's legacy can persist and be transmitted from person to person, with Bentley-Dingwall speaking emotionally of 'the love of an uncle I've never had' and describing his execution as murder (BBC, 2015).

In 1950 Timothy Evans, who had reportedly received little education (BBC, 2010) but was described in legal proceedings as being 'an impressionable man of below normal intelligence' (*Westlake* [2004] 7), was tried for the murder of his daughter, Geraldine. Initially he confessed both to this crime and to the murder of his wife, Beryl, but he then retracted the former admission. He was convicted and hanged by the state, the Home Secretary of the day having declined to recommend a conditional pardon and prevent his death, despite recommendations of mercy from the jury. Evans, however, lived at 10 Rillington Place with the chief prosecution witness in his case, John Christie. Christie was

[23] In addition they found that: he had given no direction to the jury on the standard of proof required to convict; his 'direction on the treatment of police evidence could not be supported because … he had fallen into the pitfall of inviting the jury to approach the evidence on the assumption that police officers, because they were police officers, were likely to be accurate and reliable witnesses, and that the defendants, because they were defendants, were likely to be inaccurate and unreliable'; and the judge's direction on the law and review of the evidence was not careful enough.

subsequently found to be a serial killer, convicted of one murder and hanged in 1953 but not before he confessed to the murder of Evans's wife (see *Westlake* [2004] 3-8).

Following Christie's execution there were calls for Evans to be pardoned, with prominent individuals[24] and sections of the press involved but these efforts were initially unsuccessful for a number of reasons. In particular, there were doubts (some decades prior to the Bentley judicial review) that any kind of posthumous royal pardoning was possible (see, Rubin's analysis, 2007: 51-2) and there were those who argued that 'clean hands' were required for a free pardon and disputed Evans's technical and/or moral innocence.[25] Despite resistance, in 1966 the Home Secretary, Roy Jenkins, announced a free royal pardon. However, in doing so he by no means endorsed Evans's innocence, explaining that, whilst it was at that point in time 'impossible to establish the truth beyond doubt' it was 'more probable than not that Evans did not kill his daughter, for whose murder he was tried, convicted and executed.' His justification for recommending a pardon despite acknowledging these issues around innocence was that it was not right to allow the conviction to stand and that this was an exceptional case, so did not create a precedent (Jenkins, 1966).

Subsequently, in August 2000, Evans's family were informed by the Home Office that they were to receive financial compensation, without admission of liability (*Westlake* [2004] 13). However, despite the free pardon and the compensation, Evans's conviction stood and his half-sister Mary Westlake sought to appeal this. In fact, the quashing of his conviction was not enough for her – to rectify the harm and its legacy she sought a statement of his innocence from the courts, so that his exoneration could be complete (*Westlake* [2004] 37). An application was made to the CCRC but they refused to refer the case to the Court of Appeal. According to the Chairman of the CCRC Case Committee, notwithstanding the fact that 'the quashing of the conviction would bring emotional solace to Mr Evans's family' and despite the fact that the conviction was accepted to be unsafe and there was a public interest in quashing unsafe convictions and even though a pardon did not quash a conviction, they decided that his royal pardon was enough as 'the effect of a Royal [free] pardon is to establish the innocence of a convicted person and restore his reputation'. In addition, they looked to the public view of Evans and found that his conviction and execution were seen as a miscarriage of justice and that his pardon was taken as demonstrating his innocence (*Westlake* [2004]: 30). And they looked to 'public confidence in the criminal justice system' – finding it 'had already been restored in relation to this case' because of the pardon – as well as to the costs involved in a reference (*Westlake* [2004] 17). So, in the CCRC view the harm (to Evans, to his family, to public confidence in the criminal justice system - and to the criminal justice system) was already removed in-so-far-as it could be.

The High Court reviewed the CCRC decision in the *Westlake* case, finding no evidence of unreasonableness or unlawfulness (*Westlake* [2004]). It was also noted that it was not the role or even the practice for the courts to enter into discussions of innocence (as was noted above, the appellate criminal courts look at the 'unsafety' of a conviction, see *Westlake* [2004] 32, 36). So Evans's conviction stood because he had already been pardoned, suggesting in terms of pardoning conventions that he was

[24] For example, see Kennedy, 1961.
[25] See, for example, Rubin, 2007: 54-5; *Westlake* [2004] 8-11.

innocent (because innocence had been said to be needed for a free pardon). However, in this case Jenkins's announcement of his decision was at least hesitant about any recognition of innocence. As a result, unlike Bentley's family, for Evans's some resolvable harm remains, with his family's pain continuing (BBC, 2010).

As the cases of pardoning considered above begin to suggest, and as the High Court has stated (*Bentley* [1994] 365) and Gerry Rubin has argued, royal pardoning is a 'flexible' device (Rubin, 2007: 58-59) and this can be an important factor in its ability to address harm. This means, for instance, that even the 'supposedly tightly-circumscribed' free royal pardons (Rubin, 2007: 58) have been granted when technical or moral innocence was not clear, as in the case of Evans. In addition, in Shields a free royal pardon was granted despite arguments as to whether this was legally possible under statute and in terms of international law. Moreover, royal pardons can be granted posthumously, despite previous arguments to the contrary. And from the Bentley and Shields legal cases it is evident that this 'flexibility' can be supported by the courts.[26] Indeed, this 'flexibility' has increased in the second decade of the twenty-first century.

Alan Turing has been described as the father of computer programming and he was a war hero; working at Bletchley Park he played a crucial role in cracking Nazi ciphers. However, in 1952 he was convicted of the homosexual offence of gross indecency in respect of his relationship with Arnold Murray, who was 19, and accepted chemical castration as an alternative to prison. He lost his job and ended up taking his own life in 1954 (on Turing see, for example, Caroli, 2018: 501). A campaign to pardon him resulted in a petition of 37,405 signatures in 2009 (Turing Petition). The response was an apology from the Prime Minister Gordon Brown, which aimed to address the harm caused by his conviction and sentence:

> While Turing was dealt with under the law of the time, and we can't put the clock back, his treatment was of course utterly unfair, and I am pleased to have the chance to say how deeply sorry I and we all are for what happened to him. Alan and the many thousands of other gay men who were convicted, as he was convicted, under homophobic laws, were treated terribly. Over the years, millions more lived in fear of conviction. I am proud that those days are gone and that in the past 12 years this Government has done so much to make life fairer and more equal for our LGBT community. This recognition of Alan's status as one of Britain's most famous victims of homophobia is another step towards equality, and long overdue. (Brown, 2009)

So here we have an acknowledgement of technical guilt, perhaps to highlight the view that a free royal pardon would not be possible. There was a recognition of cruelty, of a climate of fear and, by implication, of the harm experienced by Turing and many others as a result of a cultural context which naturalised heterosexuality and rejected those who failed to fit in. Also, it is notable that Brown did not miss the opportunity to promote his Government's record on LGBT issues.

[26] See especially Lord Justice Watkins in *Bentley* [1994] 365

Following the apology, another petition was started in 2011 (BBC, 2011) but the idea of a pardon was rejected by Justice Secretary Lord McNally, 'as Alan Turing was properly convicted of what at the time was a criminal offence' (BBC, 2012). The matter was eventually resolved by the granting of a free royal pardon on the recommendation of Secretary of State for Justice Chris Grayling in 2013, despite Turing's technical guilt – and here much was made of Turing as a war hero, portraying both Grayling and the Government in a particularly patriotic light.[27] This was more than just 'flexibility', the criteria were totally rewritten, although the conviction stood, of course.

So, what is revealed is the *malleability* of pardoning – even of a royal free pardoning, which was supposed to be the most rigidly confined form. Unsurprisingly, malleability is also seen in statutory pardoning. The Protection of Freedom Act 2012 (sections 92-101) began to address the harm suffered by the many men who, like Turing, had been convicted in the past of what were by this time historic homosexual offences. But, in terms of nomenclature at least, this is not a pardoning statute. The 2012 Act makes it possible for an individual to apply for certain past convictions or cautions to be 'disregarded'. A disregard means that the person concerned is treated as if they had not: committed the offence; been charged with, or prosecuted for, the offence; been convicted of the offence; been sentenced for the offence; or been cautioned for the offence; and all the negative effects of the conviction or convictions are removed (for example, in terms of employment) (section 96). The process is free of charge[28] and an individual can appeal to the High Court against a refusal to grant a disregard (section 99).

In 2017 matters were taken further, with the passing of the Policing and Crime Act 2017 (sections 164-167). In the words of the then Justice Minister Sam Gyimah, 'This is a truly momentous day. We can never undo the hurt caused, but we have apologised and taken action to right these wrongs.' (Ministry of Justice, 2017) The 2017 Act follows the same approach as the 2012 Act, so a pardon can only be granted if the other person involved in the conduct constituting the offence consented and was 16 or over and if the conduct would not now be an offence under section 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory). Posthumous pardons were automatically granted where applicable (section 164), with cases reaching back to the late nineteenth century – Oscar Wilde was reportedly pardoned of some of his crimes. Indeed, estimates have suggested that tens of thousands of men have been posthumously pardoned by the measure (see for example, McCann, 2017). In terms of men who were still alive, the 2017 Act meant that individuals who already had a disregard or disregards were pardoned in relation to that offence or those offences (section 165). In addition, anyone granted a disregard following the 2017 Act is simultaneously pardoned (section 165).[29] And a failure to grant a disregard can be appealed to a court and a disregard now becomes a pardon, meaning that (indirectly) a failure to grant a pardon can be appealed. As a consequence, the courts have an appellate role in this mode of statutory pardoning[30] as well as the ability to look into royal pardon recommendation decisions.

A pardon granted as a result of the 2017 Act does not affect any conviction, caution or sentence, or give rise to any right, entitlement or liability. However, it also does not

[27] See Turing Pardon and Grayling, 2013.
[28] For information, the process and the application form see Home Office (a).
[29] As of April 2019, Home Office statistics reveal that 186 historic homosexual offences had been found to be eligible to be disregarded and thereby pardoned. Home Office, 2019.
[30] Although to date no appeals have been granted - Home Office, 2019

affect the prerogative of mercy (section 167), nor prevent an attempt to bring an appeal. This all means that the remedy provided by this statutory pardon is again only partial and it is regarded as not being anywhere near enough by some; indeed, there is a good deal of anger at this approach to addressing these particular harms of the past, with suggestions a royal pardon would be preferable or that something else entirely is needed.[31]

Thus far, pardoning has been portrayed as a broadly benevolent device (although there have been hints at other interpretations along the way) – it (sometimes) addresses and (at least partially) remedies harm. And a pardon undoubtedly has a great importance and a very real promise and effect for those who seek and obtain one – this should not be forgotten. However, of course, pardoning's relationship with harm is more complex. Most significantly, the malleability discussed above is exercised by the powerful – by Parliament or a Secretary of State, who can seek advice but need not take it.[32] Hence Jenkins's ability to ignore the ways in which royal free pardoning was supposed to operate and pardon Evans. So pardoning decisions are exercises of power; as we saw above, pardoning is malleable - or perhaps *biddable* is a better word. In the light of this and building upon what has been argued already, pardoning's plasticity needs to be reconsidered. Can the decisions to recommend and grant pardons discussed above be seen as being wholly about beneficence, for instance, or might we sometimes look to other reasons for a pardon? And how might a refusal or a reluctance to pardon be conceived?

Because of the malleability of the pardoning device, as Rubin has pointed out, in recent times 'politics' can be brought into a decision as to whether to recommend a royal pardon (Rubin, 2007: 46, 57 and see Quirk, 2009).[33] This is, of course, the case whether a royal pardon or a statutory pardon is at issue. In some cases this might mean that a pardon is granted (one might point to the political benefits of popular pardoning, of being seen to support the LGBT community or restore the reputation of a war hero, for instance).[34] Most starkly though, Home Secretaries have felt able to take into account the possible political effects of carrying out or failing to carry out an execution. This is most obviously seen in cases with links to Britain's relationship with the island of Ireland and related political violence, including, for example, in the Roger Casement treason case (1916) and Coventry Irish Republican Army bombing case (1940), where the different predicted impacts on public opinion in the country and further afield were considered. In both instances the executions went ahead (see Rubin, 2007: 46, 57). Here the exercise of power, the malleability – or biddability - of a pardon takes on a much more sinister quality and, as a result, the criminal justice system is left to do its business and terminal harm is inflicted.

Alongside this, a tendency to resist addressing criminal justice system harms, such as was seen in the decision not to refer Evans's case to the Court of Appeal, is alarming but also unsurprising. Indeed, it is to be expected. Pardoning (and quashing a conviction or altering a sentence) in addressing harm also reveals and acknowledges criminal justice

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[31] For example, actor Rupert Everett described Wilde's pardon as a 'last fart of British hypocrisy', calling for an apology and compensation for his descendants as well as voicing disappointment that what was given was not a royal pardon but rather the less glamorous statutory device.

[32] See, further, for example, Rubin, 2007: 58-9.

[33] Historically, '[t]he power to pardon was overtly political'. Quirk, 2009: 649.

[34] And in relation to the Shields pardoning see Quirk, 2009; Bounds and Peel, 2009; Statement from the Justice Minister to the *Financial Times*, 2009.

system unfairness, injustices and errors as well sometimes as wrongdoing on the part of criminal justice personnel.[35] It can also mean that appellate judges are called upon to criticise a fellow judge, as in the executed Bentley's successful appeal, something that they are extremely uncomfortable doing as the Court of Appeal judgment explained: '[i]t is with genuine diffidence that the members of this Court direct criticism towards a trial judge widely recognised as one of the outstanding criminal judges of this century.' (*Bentley* [2001] 334) In this exposure and recognition, pardoning (and appeals) can harm by tarnishing the criminal justice system's reputation, it can undermine public confidence and call the system's legitimacy into question. But it is not just the criminal justice system which might be doubted as a consequence of a pardon (or appeal) - the harm done might be more far-reaching, touching upon the justice system as a whole, Government, Parliament. And, lest it be forgot, a reluctance to recommend or grant a pardon might also be affected by cost and floodgates concerns. With all this in mind it is worth recalling that one of the CCRC's concerns in the Westlake application was to look not only at cost but also at whether public confidence in the criminal justice system had already been restored by the pardon. If it had been, then an appeal was not needed. Addressing harm to the system, therefore, seemed to be a priority here despite the 'emotional solace' which the CCRC acknowledged an appeal might bring to Evans's family.

More broadly, in terms of harmfulness, pardoning (and appeals) might be said to contribute to a harmful cultural context by only addressing a minority of the harms of the criminal justice system, doing so only partially and by generally leaving the system itself untouched (the Beck and Birmingham Six cases being amongst a few notable exceptions in that they led to some degree of wider change). In this context, pardoning might be described as harmfully reassuring. How might existing theory help develop this thinking? A first step might be to say that, adapting Palmer, pardoning is harmful because it creates, encourages or reinforces the view that all is well with the criminal justice system. In doing so it normalises favourable ideas about the system. It demonstrates that criminal justice system injustices and unfairnesses are rectified.

More specifically, pardoning might be seen as harmful precisely in its benevolent flexibility (as opposed to the more rule-bound appellate system); in its shoring up of the criminal justice system; in the reassurance it might be said to offer that everything will turn out well in the end (although the end might take some time to reach and there is no guarantee that a pardon will be granted). In this way, pardoning casts the criminal justice system in an unjustified rosy hue. Its effect here is ultimately to distract and direct attention away from the injustices which a pardon addresses, along with other failures, abuses and unfairness in and of the system. And, perhaps particularly in the case of a royal pardon, its splendour blinds, one might say, the observer to the darker things that lie within the criminal justice system.

Consequently, a pardon – an intervention from beyond the criminal justice system - supports the fiction of a fair (criminal justice) system, allowing harm to continue. It provides a scaffold for the notion that all is well with the criminal justice system, despite all the evidence that might suggest otherwise. Evidence which might be drawn, for example, from: the disproportionate use of stop and search in relation to BAME

[35] For an example of such wrongdoing in relation to pardoning, see Rubin, 2007: 46, 56.

individuals; abuses of process revealed in appeals; the differential treatment of property crimes committed on the street from those committed in the suite; the continuing tendency to focus on bodily harms caused by conventional assaults rather than health and safety offences; and a failure adequately to deal with gendered violence. Moreover, pardoning frames criminal justice system mistakes as individualised anomalies, as unusual or exceptional cases, diverting attention from structural issues. In so doing, pardoning deflects attention from harm.

Historic pardoning can have an added effect. It may sometimes serve to demonstrate that the present-day criminal justice system can recognise and address the injustices and unfairnesses (the harm) of the past, giving the impression that the criminal justice system is now fair. In this way, the present is normalised (and seen as fair), whilst the past is othered (as a time of injustice). So pardoning, however historic, tells us something about both the present and the past. However, sometimes there is a reluctance to officially acknowledge that a past system was unfair. In the case of the soldiers executed during the First World War the pardon recognised the men as victims of the war, not of the military justice system at the time (section 359 Armed Forces Act 2006). This is by no means entirely surprising as, despite changes including the abolition of the death penalty, the military justice system arguably remains largely the same as it was in the early twentieth century when it comes to the treatment of Forces personal who are perceived to be troublesome.[36] And it remains a powerful force keen to protect its reputation in the past, present and future.

Conclusion

This article has begun to explore pardoning and harm in a zemiological vein. It is suggested that, at least in the context of pardoning, a general harm analysis is more productive than focusing merely on the harm caused by pardoning because in order to understand pardoning and harm one needs to take a broad view. For example, we have seen that pardoning does indeed sometimes recognise and partially resolve some forms of harm (and this is hugely important for the harmed), but there is also a reluctance to undo harm. Moreover, pardoning can also be culturally harmful in shoring up the criminal justice system.

In terms of the analysis of pardoning, this article presents some early thinking. More work might be done investigating the recent history of pardoning. In addition, the relationship between pardoning and appeals is complex, evolving and warrants further thought from zemiologists. Beyond this, zemiological accounts of the recent history and current use of pardoning could revisit scholarship which has inquired into pardoning prior to the twentieth century.[37] Comparative work would also be productive, looking at pardoning in other jurisdictions. In particular, a major gap in the analysis above relates

[36] A similar point was made by Piet Chielens (coordinator of the In Flanders Fields Museum in Ieper) at the AHRC *Commemoration, Conflict and Conscience* festival in Bristol, 2019 (for details of the festival see https://everydaylivesinwar.herts.ac.uk/ccc/). The treatment of conscientious objectors by the military in the First World War and the present arguably provides an illustration of this lack of change. See Bibbings, 2011.

[37] Which include, for example: Hurnard, 1969; Hay, 1975; Gatrell, 1994, especially pp 197-221; Lacey, 2009; Kesselring, 2009; King and Ward, 2015; Devereaux, 2017.

to Ireland when it was part of the UK and Northern Ireland, including consideration of apologies, amnesties, pre-conviction pardoning and remissions.[38]

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[38] On Northern Ireland see, for example: McEvoy, 1999; McEvoy and Mallinder, 2012; McEvoy *et al*, 2015. On appeals and the CCRC in this context see Quirk, 2013.

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